IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY, Plaintiff, v. SPIN-GALV, A DIVISION OF ROGERS GALVANIZING COMPANY, CHARLES B. GRANT, ELISE P. GRANT, ELISE P. GRANT TRUST, CHARLES B. GRANT REVOCABLE TRUST AND MCJUNKIN CORPORATION (FORMERLY KNOWN AS GRANT PIPE SUPPLY) Defendants	)	03-CV-162-P(J)

ORDER

Now before the Court is Defendants Charles B. Grant and the Charles B. Grant Revocable Trust's motion for summary judgment, Plaintiff The Burlington Northern and Santa Fe Railway Company's response, Defendants' reply, and Plaintiff's correction to the statement of facts as ordered by the Court for violation of Local Rule 56.1(B). For the reasons stated herein, Defendants' motion is GRANTED in part and DENIED in part.

Facts:

In the earlier part of the 1900s, an oil refinery was located and operated on the land at issue in this lawsuit in addition to other land in the area. During this time, the refinery deposited

209

some of its waste on the land.[1] The refinery then ceased its operations in the 1930s. Then, more than forty years later in 1974, Charles B. Grant purchased a large tract of the land which was once a part of the old refinery. Near that same time, also in 1974, the Frisco Railway purchased a section of the old refinery property which was used to make up part of what is now known as the Cherokee Rail Yard. The section of the land purchased by the Frisco abuts the Grant property located immediately to the East. After a series of mergers, Plaintiff became the owner and possessor of the Cherokee Rail Yard.

In 2001, Plaintiff removed a large amount of TLM from the land in the Cherokee Rail Yard. Then, in 2003, Plaintiff filed this action under the theories of nuisance, trespass, and unjust enrichment to recover the costs of remediation. In support of its theories, Plaintiff contends that due to the migratory nature of the TLM as it heats and expands in the summer months, the material, over time, moved from the Defendants' property onto the rail yard. Moreover, Plaintiff's urge this Court to order the remediation of TLM which is still located on the Defendants' property as it is violative of the Resource Recovery and Conservation Act ("RCRA"). Conversely, the Defendants deny that the removed TLM has its origin on their property. Instead, Defendants contend that the TLM was located on the Plaintiff's property at the time of purchase in 1973, as both portions of the property were owned by the refinery.

Discussion:

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

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[1] The waste deposited is described as a tar-like asphalt byproduct that will be referred to as "TLM" (tar-like material).

the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). The court is to "view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party" when it makes this determination. *Simms v. Okla.*, 165 F.3d 1321, 1326 (10th Cir. 1999). And, if any part of the prima facie case lacks the sufficient evidence to require submission to the jury, summary judgement is appropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Under this analysis by the court, the presence of a genuine issue of material fact defeats the motion. A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Id.* at 249. Specifically, a fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Id.* at 248. While, an issue is "material" if proof thereof might affect the outcome of the lawsuit as assessed from the controlling substantive law. *Id.* at 249.

A. Resource Recovery and Conservation Act ("RCRA")

The RCRA allows any person to commence a civil action for violations of the Act. *See* 42 U.S.C. § 6972(a). Here, Plaintiff alleges that Defendants' actions are actionable under both § 6972(a)(1)(A) and § 6972(a)(1)(B) of the citizen suit provision of RCRA. Because of Plaintiff's failure to specifically outline which "permit, standard, regulation, condition, requirement, prohibition, or order" as envisioned by (a)(1)(A) until ordered to do so by this Court and less than one week before trial, the Court has dismissed that cause of action because of the prejudice to the Defendant that would result from proceeding. *See* Court's Order of 9/17/2004. As such, the remaining cause of action for a citizen suit pursuant to RCRA is asserted under § 6972(a)(1)(B)

by the Plaintiffs.

Subsection (b)(1)(B) of the citizen suit section of RCRA remains. Plaintiff also brings an action under RCRA under subsection (b)(1)(B) of the Act. This section of the Act allows a citizen to bring suit "against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). The first two prongs of this section are satisfied in that Defendants are persons under the law and are contributing to the storage of the TLM on their property by allowing it to remain. Next, the question of whether the waste is solid, hazardous, or neither is unnecessary to reach in this analysis because the Court finds that it does not "present an imminent and substantial endangerment." *Id.*

The Supreme Court, in the case of *Meghrig v. KFC Western, Inc.*, provided the courts with guidance in how to assess the imminency of an endangerment under the RCRA. *See* 516 U.S. 479, 484-86 (1996). "An endangerment can only be 'imminent'" the Court explained "if it 'threaten[s] to occur immediately." *Id.* at 485. In this case, the TLM which was removed from the BNSF property but still remains on the Defendants' property does not satisfy the imminency requirement of the law. It is undisputed that the TLM was deposited on the land[2] by the oil refinery which ceased operations in the 1930s. In the more than half a century that has passed since the initial disposal of the TLM, Plaintiff can point to no person who has been injured, nor can Plaintiff point to any study that shows the material would "immediately" cause harm to a

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[2] It is undisputed that the TLM was placed on the land by the oil refinery; however, where and whether that material was placed on the BNSF land is very much at issue. However, that question does not matter for the resolution of this issue, as only the origin and time is significant.

person or the environment. Instead, the facts illustrate otherwise. The facts that the material had been on the Defendants property for nearly seventy years without any order by the ODEQ or the EPA requiring the material to be removed, despite studies of the substance, illustrate that such an imminent threat was not present. Furthermore, Plaintiff's monitoring of the alleged migration of the TLM from the Defendants' property to their own over a ten-year period shows that even the Plaintiff did not find the material to present an imminent threat. As a result, Plaintiff's citizen suit under the RCRA fails and Defendants' motion for summary judgment is hereby GRANTED on that issue.

B. Abatement of a Nuisance

Plaintiff's next cause of action is for injunctive relief from the Court to order the Defendants to remove the TLM from their property to prevent its further migration. Because this issue is one of equity, the Court stands as both the jury and judge.

Without reaching the question of whether the TLM, which undisputably still remains on the Defendants' property, is a nuisance,[3] the Court finds that the nuisance has already been abated by the placement of a berm between the two properties. Plaintiff's expert witness Edwards/Hurley states in her deposition testimony that there has been no further migration of the TLM onto the BNSF property since the berm was erected between the properties.[4] In opposition, Plaintiff points to the testimony of the same witness who asserts that the TLM is moving closer to the berm and will eventually overcome it and move onto the BNSF property. The Court does not find this testimony reliable as both witnesses admit they have performed no

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[3] That issue, including the categorization of the nuisance, will be addressed by the Court later in this order. *See infra*.

[4] The berm was installed at the time of remediation which occurred in 2001.

measurements or scientific studies to determine the movement toward the wall. Depo. Edwards/Hurley vol. 2, 261:13-262:1-6 (June 29, 2004). Instead, the expert admits that she relied upon simple visual inspection of the berm and the TLM on the Defendants' property. As such, the testimony of Edwards/Hurley without further scientific or substantive evidence is wholly inadequate to overcome the evidence showing that the alleged nuisance was abated by Plaintiff's erection of the berm on the property. Thus, Defendants' motion for summary judgment with regard to Plaintiff's action for an order requesting abatement of the alleged nuisance is hereby GRANTED as the Court finds the alleged nuisance was previously abated as described herein.

C. Nuisance

Plaintiff's next cause of action is under the Oklahoma law of nuisance. The allegations of Plaintiff suggest Defendants allowed the TLM to migrate onto their property over time, and thus were in violation of the nuisance laws. Along with this inquiry, are the questions of the categorization of the nuisance as either public or private, whether it rises to the level of nuisance per se, and whether the damages are permanent or temporary. Along with each of these characterizations come different limitations.

Oklahoma law defines nuisance as

> unlawfully doing an act, or ommitting to perform a duty, which act or omission either . . . Annoys, injures or endangers the comfort, repose, health, or safety of others; or . . . offends decency; or . . . interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or . . . In any way renders other persons insecure in life, or in the use of property . . . .

50 Okla. Stat. § 1. In this case, the Court finds that there is a factual question as to whether the Defendants' actions or omissions constituted a nuisance as defined by the law. Specifically, the

Court finds that the question of whether there was in fact migration of the TLM from the Defendants' property to the BNSF property is a threshold question in that determination. Because the migration issue is strongly disputed between the parties, that question will be tried to the jury. However, the focus of the inquiry will be limited to the concept of nuisance as described by Oklahoma Law.

Under Oklahoma law, when analyzing a nuisance cause of action, the distinction between the public and private nature of the nuisance is a necessity. "A public nuisance" by definition "is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." 50 Okla. Stat. § 2. The statutes then categorize any type of nuisance that is not included in the definition of a public nuisance to be one private in nature. *Id.* at § 3. Under this statutory framework, Plaintiff is not able to establish a claim for a public nuisance, as there has been no evidence submitted to show that the alleged migration had any effect outside of the Plaintiff's land.

Plaintiff alternatively asserts that a public nuisance exists by citing to Oklahoma Environmental Laws. Specifically, Plaintiff points to 27A Okla. Stat. § 2-6-105 to show that Defendants' actions constitute a public nuisance under the law. This section of the Statutes reads, "It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance." *Id.* at § 2-6-105(A). As Defendants point out in their briefs, subsection B of that law requires an affirmative act from the Executive Director of the Department of Environmental Quality to issue

an order requiring the cleanup of the pollution.[5] In this case, the Department of Environmental Quality studied the TLM on the land but the Department never ordered a cleanup of the property.[6] As a result, the Court finds that the nuisance at issue here is not a public nuisance as defined in both the environmental and nuisance sections of the Oklahoma Statutes, so Defendants' motion for summary judgment finding that the alleged nuisance, if such nuisance exists as discussed *supra*, is private in nature is hereby GRANTED. *See* 27A Okla. Stat. § 2-6-105; 50 Okla. Stat. § 2.

Plaintiff's assertion that the alleged migration of the TLM constitutes a nuisance per se fails as a matter of law. The Oklahoma Supreme Court has defined a nuisance per se as "an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1276 n. 6 (Okla. 1991); *see also City of Tulsa v. Tyson Foods, Inc. et al.*, 258 F. Supp. 2d 1263, 1290-91 (N.D. Okla. 2003) (vacated for reason of settlement). Because this Court finds that a factual question exists as to whether a nuisance exists in the first place, the Court rejects Plaintiff's argument that the alleged migration is a nuisance "at all times and under any circumstances" as required by the law. Furthermore, the undisputed fact that the TLM's alleged migration only occurs during the heat of the summer months illustrates that the migration does not constitute a nuisance at all

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[5] Plaintiff asserts that no caselaw supports the coupling of subsection B with that of A in the statute. But, Plaintiff fails to show any caselaw supporting its position that the two subsections should be read independently. The Court finds the tools of statutory construction require the two subsections be read in concert.

[6] The Court takes note of the fact that Plaintiff asserts that they were in fact verbally ordered to cleanup the TLM by a member of the Department. Depo. Edwards/Hurley vol. 1, 45:12-46:15 (Apr. 2, 2004). However, no evidence of that verbal order has been submitted to the Court. Furthermore, the individual agent of the Department whom allegedly made that order fails to remember making such an order. Depo. Ray Roberts 16:6-17:11 (July 27, 2004).

times. Thus, Defendants' motion for summary judgment finding that the alleged nuisance is not a nuisance per se is hereby GRANTED.

Next, Defendants ask the Court to find that the nuisance damages are permanent rather than temporary. The distinction between permanent versus temporary damages determines the point at which the two-year statute of limitations shall apply in the case. If the damages are found to be permanent, the two-year limitation period begins to run at the time of discovery of the nuisance.[7] *See Davis v. Shell Oil Co.*, 795 F. Supp. 381 (W.D. Okla. 1992) ("resolution of the statute of limitations defense here lies on when plaintiffs knew or should have known of the alleged nuisance"). Alternatively, if the damages are found to be temporary, only the damages sustained in the immediate two years preceding the filing of the action are recoverable. *See City of Bethany v. Municipal Securities Co.*, 274 P.2d 363, 367 (Okla. 1954) ("damages suffered [from a temporary nuisance] are limited to the two years preceding the filing of the suit); *see also Branch v. Mobil Oil Corp.*, 788 F. Supp. 531, 535-36 (W.D. Okla. 1991); *see also Haenchen v. Sand Prod. Co., Inc.*, 626 P.2d 332, 334 (Okla. Ct. App. 1981) ("[Plaintiff] will not be barred in bringing his action but must limit proof of damages to the two years . . . preceding the filing thereof."). For the reasons stated below, however, the classification of the damages from the nuisance is a question of fact for the jury.

Oklahoma has well-established case law that determines if a nuisance is one for permanent or temporary damages. The underlying question in determining whether damages are permanent or temporary is whether the nuisance is abatable. *See Briscoe v. Harper Oil Co.*, 702

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[7] In this case, if the damages are found to be permanent by the jury, the statute of limitations will apply and defeat Plaintiff's actions. This is because the undisputed facts show that Plaintiff knew of the alleged migration well in advance of two years prior to the filing of this suit.

P.2d 33, 36 (Okla. 1985). In fact, temporary damages in the nuisance context "are by definition abatable." *Id.* On the other hand, "[d]amages reasonably incapable of abatement are permanent." *Id.* And, "under Oklahoma law, a nuisance is abatable, and ergo continuing, if it is *reasonably* possible to correct the situation." *Davis*, 795 F. Supp. At 384.

Here, there is a question of fact concerning whether the nuisance was "reasonably" abated when the TLM was removed from the Plaintiff's property. Defendants cite the difference between the value of the property and the remediation costs to show that it was unreasonable for the abatement to have been performed. Plaintiffs, on the other hand, assert that at least part of the alleged nuisance–that portion of the TLM which was on the BNSF property–had been abated, so by definition the TLM was abatable. As the Oklahoma Supreme Court has said, "Reasonableness is a question of fact." *Burkhart v. Jacob*, 976 P.2d 1046, 1051 (Okla. 1999). Therefore, summary judgment on this issue is improper and Defendants' motion is DENIED with respect to the distinction between the temporariness and permanence of the damages.

In sum, Plaintiff's cause of action under the Oklahoma nuisance laws is hereby limited to determining whether a nuisance did in fact exist and whether the damages are permanent or temporary in nature. The Court notes that if the damages are found to be permanent in nature by the jury, the statute of limitations will apply to this action barring Plaintiff's recovery.

D. Trespass

Plaintiff has also brought a cause of action under the theory of trespass. As Plaintiff's admit, "[its] trespass claim overlaps its nuisance claim in many respects." Plaintiff's Response to Motion for Summary Judgment at 29. Under Oklahoma law, "[t]respass involves an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession." *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998).

Similar to the nuisance claim, there is a question of fact as to whether there was a physical invasion onto the property of Plaintiff. If the TLM is found to have migrated from Defendants' property onto that of the rail yard, then there may be a cause of action under a trespass theory; however, since migration is a disputed question for the jury, summary judgment is inappropriate on that aspect.

However, summary judgment on the trespass claim is proper because the statute of limitations ran before this action was commenced. In Oklahoma, the statute of limitations for Trespass to Realty is two years from the time that the cause of action accrues. *See* 12 Okla. Stat. § 95(3). Again, the classification of damages plays a role in the determination of when the statute runs in a case of trespass; however, no matter the type of damages caused by the alleged trespass, Plaintiff's cause of action is barred. For a permanent-damages action under trespass, the statute begins to run at the time the Plaintiff knew of the damage or should have known of the damage caused by the alleged trespass. *See Harper-Turner Oil Co. v. Bridge*, 311 P.2d 947, 949-50 (Okla. 1957). A claim for a temporary-damages trespass, on the other hand, begins to run the statute at the time the first injury occurs. *See Herwig. v. Guthrie*, 78 P.2d 793, 796 (Okla. 1938).

In this case, the alleged trespass occurred and the Plaintiff became aware of the trespass well in advance of two years before the filing of this action. Plaintiff's witness Brownlee has admitted to studying and observing the TLM migration since at least the early 1990s. Furthermore, Plaintiff began to study and plan remediation by attempting to attract the state ODEQ to order a cleanup in the late 1990s. Therefore, Plaintiff was certainly aware of the trespass damages in advance of March 2001, two years before this action was filed. Moreover, because of the admitted slow movement of the TLM, and the admitted fact that the TLM only moves during the summer months when it is hot outside, the amount of movement during the two

years immediately preceding this action, if any, was negligible and does not constitute a continuing trespass as a matter of law. *See Fairlawn Cemetary Assn. v. First Presbyterian Church, U.S.A. of Okla. City*, 496 P.2d 1185, 1188 (Okla. 1972) ("The evidence does not show the encroachment caused further damage within the two year limitation period. But even assuming further damage, the injury was so far inconsequential compared to the damage done prior to the two year limitation period"that the statute of limitations would bar any damages).

Even though Plaintiff's damages for trespass are barred by the applicable statute of limitations, the Court could still enter an order in equity requiring that the trespass be restrained. *See id.* at 1187. However, as determined earlier, the Court finds the TLM which was allegedly migrating to have been abated previously by the placement of a berm on the property. As a result, the Court cannot order the removal of that substance since it is no longer present. Thus, Defendants' motion for summary judgment on the trespass claim is hereby GRANTED.

E. Unjust Enrichment

Plaintiff's final cause of action in this lawsuit is for the equitable remedy of unjust enrichment.[8] In Oklahoma, the equitable remedy of unjust enrichment is available when there is "enrichment to another coupled with a resulting injustice." *Teel v. Public Serv. Co. Okla.*, 767 P.2d 391, 398 (Okla. 1985). To establish enrichment as described by the Supreme Court, there must be an affirmative requirement or duty of the Defendant that would have been performed by the Defendant but for the Plaintiff's actions. In that sense, the Plaintiff's actions work to "save the other from expense or loss." *McBride v. Bridges*, 215 P.2d 830, 832 (Okla. 1950).

In this case, Plaintiff claims that the Defendants were unjustly enriched by the Plaintiff's

[8] Plaintiff also pled contribution, however, as the Amended Pre Trial Order reflects, the contribution cause of action was eliminated. As a result, the Court will not address any issues of contribution in this order nor at trial.

removal of the TLM from its property. Because there is a question of fact concerning the nuisance cause of action–whether the TLM did in fact migrate from Defendants' property onto the BNSF property–summary judgment is inappropriate on this issue. Of course, any damages that may be awarded to the Plaintiff for unjust enrichment will be set off by any damages awarded for the nuisance. In addition, because there was never an order from the ODEQ or the EPA requiring a cleanup of Plaintiff's property, the damages allowable under the theory of unjust enrichment will be limited as discussed below. *See County Line Investment Co. v. Tinney*, 933 F.3d 1508, 1518 (10th Cir. 1991).

In addition, the Court finds that Defendants may have been unjustly enriched by Plaintiff's placement of a berm on the property line to prevent further migration. If the jury does find that migration was occurring from the Defendants' property onto Plaintiff's, then Plaintiff shall be entitled to recover the costs spent to place the berm on the property to prevent any further migration. Therefore, Defendants' motion for summary judgment on the issue of unjust enrichment is hereby DENIED.

F. Damages

With the remaining claims of private nuisance and unjust enrichment remaining in this action, Defendant moves for summary judgment that the damages be limited as required by Oklahoma law. Specifically, Defendants assert that if the damages are deemed permanent the diminution in the value of the land should be the ceiling for damages and that for temporary damages the ceiling for damages is the lesser of the diminution in the value of the land or the costs of cleanup. Because a finding of permanent damages to the land will bar this action under the statute or limitations, this discussion will instead focus on temporary damages to land.

Longstanding Oklahoma law has capped damages to real property to the value of the land.

See e.g. Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962). In fact, the Oklahoma Supreme Court noted in 1995:

> Oklahoma case law from statehood to the present, including cases resolved under the Act as of 1986, have interpreted the proper measure of damages to be diminution in value. . . . the essence of the *Peevyhouse* holding–to award diminution in value rather, than cost of performance, has been consistently adhered to in cases giving rise to temporary and permanent damages to property. This approach . . . still represents the majority view.

Schneberger v. Apache Corp., 890 P.2d 847, 852 (Okla. 1995). Plaintiff, with citation to a Western District of Oklahoma case, argues that the law no longer limits damages as outlined by *Peevyhouse*. *See Davis v. Shell Oil Co.*, 795 F. Supp. 381, 385 (W.D. Okla. 1992). In *Davis*, the Court noted that "courts in Oklahoma do not follow *Peevyhouse* . . .This court likewise will not follow *Peevyhouse*." *Id.* Plaintiff fails to note, though, that the Oklahoma Supreme Court specifically reaffirmed the holding in *Peevyhouse* in its 1995 *Schneberger* opinion, and this opinion was released subsequent to *Davis*. Moreover, the *Schneberger* Court specifically discussed and repudiated the *Davis* decision before reaffirming the long-standing damages limitation in Oklahoma. 890 P.2d at 851.

As a result, Plaintiff's damages if Defendants are found liable for nuisance or were unjustly enriched shall be limited by the value of Plaintiff's property. "For temporary injury to land" the Oklahoma Supreme Court stated "is the cost of restoring the land to its former condition, with compensation for loss of use of it, if this altogether is less than the diminution in value with the injuries left standing." *Houck v. Hold Oil Corp.*, 867 P.2d 451, 460 (Okla. 1993). Consequently, the damages available for Plaintiff to recover at a maximum will be the diminution in the value of the land, not the cost of cleanup.

Conclusion:

In sum, the Motion for Summary Judgment is GRANTED in part and DENIED in part. The remaining causes of action in this lawsuit, and those which will be tried to a jury include: 1) whether the alleged migration of TLM from Defendants' property onto the Plaintiff's property in fact constituted a nuisance, 2) whether, if such nuisance did exist, the damage to the land was permanent or temporary in nature–if permanent the action is barred by the statute of limitations and if temporary the damages are limited to the two years immediately preceding the filing of this action, 3) whether the Defendants were unjustly enriched by the actions taken by Plaintiff to remove the TLM from its property and erect a berm, and 4) whether the cost of cleanup was greater than the diminution in the value of the property, in which case Plaintiff shall only be entitled to the diminution in land value. The causes of action which are hereby dismissed from this case include: trespass because barred by the statute of limitations; RCRA because the threat is not imminent and substantial; and public nuisance and nuisance per se because there had been neither an order deeming the property to be such a nuisance by the Director of ODEQ nor did the TLM did

pose a threat to all people.

IT IS SO ORDERED this 5th day of October 2004.

James H. Payne

United States District Judge